Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 421.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Plaintiff in Error,*

vs.

STATE OF NORTH DAKOTA, *Defendant in Error.*

Reply Brief.

In our brief we gave the ultimate fact found that in the transportation of coal the operating expense exceeded the revenues received from that traffic from $9,000 to $12,000 each year. In view of the brief of defendant in error we feel justified in again referring to the findings.

FACTS FOUND.

The facts are found by the court in great detail. It is wholly immaterial whether they are called "evidentiary" or "ultimate." The nature of the finding determines its character. The short time intervening between the service of defendant in error's brief and the day of the submission of the

cause precludes a review of the cases cited, or a careful analysis of the various statements as to the facts found and will only permit a reference thereto by groups. There are several rather remarkable statements as to the evidence and facts found that we cannot well pass unnoticed. These statements will be found from pages one to five inclusive of the brief and then repeated at several places throughout the brief. They may be grouped as follows:

1. It is said that the "Soo's" evidence is at points unsatisfactory and does not furnish sufficient data. The court's opinion at page 17, volume 1 of the record is relied upon for this statement.

This contention is without merit (a) because the state has in no way brought before this court for review the question of the sufficiency of the evidence to sustain the findings of fact and (b) the contention is without foundation in fact. This is made clear by a brief statement. Three defendants were charged with a violation of this statute. The cases involved the transportation of but one commodity with the same kind of equipment, serving the same community under nearly the same conditions that govern operating expense. The difficulty of proving the confiscatory character of legislation affecting one commodity has been "often remarked" and it was important in these cases to exhaust the resources to accomplish the desired result. Nothing could be gained by duplication of proofs but much could be expected by the use of all known methods. The Great Northern took one method, the North-

ern Pacific another, and the Soo several methods and the state took a like course. It was agreed in the record that all of the evidence so far as applicable should be considered in each case. What was said by the court at page 19, of Vol. 1, of the record, related entirely to the "Revenue Method" and had no bearing whatever upon any one of the half dozen other methods shown by the evidence. The court either quoted from or referred to all of them for facts established by the evidence. The Soo contended that each method—even the evidence introduced by the state, especially that of Mr. Little, the state's expert—proved confiscation. The evidence of the Great Northern and Northern Pacific as to the cost of transportation per unit, supplemented by the other evidence in the record, furnished proof also of the insufficiency of the revenues received by the "Soo" to pay operating expenses. We believe it safe to affirm that no rate case has been submitted to the courts where the facts have been so clearly established by the evidence as this one.

2. Counsel make the point, inferentially at least, that the court did not find that the operating expenses exceeded the revenues, or differently stated, that the court made no finding as to the amount of the operating expenses of the "Soo." The decision as a whole must be read to determine the force of this contention, but we will refer to and quote from sufficient of the findings to make clear our views.

The state was well satisfied with the methods and proof of the Northern Pacific as to operating

expenses in the transportation of coal. Mr. Hillman, one state expert, adopted the same method and with differences on minor points agreed with the Northern Pacific experts. Here was an excellent starting point for the court. The points of difference between the experts were disposed of by the court and the operating expense per unit as established by the two experts were found by the court (Vol. 1, Record, page 8).

The conditions that make operating expenses in the transportation of coal on the three roads were before the court. The operating expense per unit of the Northern Pacific having been found by the court, it only remained to add to or take therefrom for the other two roads as the evidence warranted and established. This the court did and the results reached are stated in the opinion. The results reached express the court's conclusions in light of all of the evidence.

The court found that the operating expenses of the "Soo" per unit equalled that of the Northern Pacific and in some respects exceeded the operating expense of that company. Making proper allowance for such excess definite conclusions were reached as to the operating expense per unit.

After finding the operating expense of the "Soo" the court then turned to the revenue received from this business by that company. Of course, the revenues were a fixed quantity. The court found that the "Soo's" revenues were curtailed as compared with that of the Northern Pacific (a) by reason of the short loaded car hauls, and (b) by rea-

son of the pro-rating provisions of this statute. The conclusion was inevitable. The Northern Pacific only had $847.00 after payment of operating expenses for the transportation of coal. The "Soo" had a greater operating expense and less revenue. This left the "Soo" without earnings to pay all operating expenses, excluding the pro-rating losses caused by the statute and with an actual loss of from $9,000.00 to $12,000.00 including such losses.

It is axiomatic that the longer the empty car haul the greater the operating expense, and the shorter the loaded car haul the less the revenues and profits received therefrom. As compared with the Northern Pacific the "Soo" suffered in both respects. It had the shortest loaded car haul and the longest empty car haul. A few excerpts from the court's findings will make this clear.

> "For comparison we here state that the empty car mileage of the Soo amounts to approximately 20 per cent more than that figured as the empty car mileage of the Northern Pacific, but the average loaded car haul of the Soo is but 41.76 miles (plaintiff's Soo Exhibit IC) as against an average of 80 miles for the Northern Pacific" (Vol. I. R., p. 11).

And then again at the bottom of page 20:

> "And as local conditions are matters of which the court will take judicial notice we know that nearly 100 per cent empty car haul was necessary to earn this amount, as the north bound Soo freight from Bismarck to 28 miles north of Wilton must be practically nothing compared with this number of cars, 2,532, necessary to be used at Wilton for this haul. This item constitutes over one-third of car loads handled and over one-fifth of the entire

revenue received from lignite haul for the year" (Vol. I, R., p. 20).

And again at the bottom of page 24:

"The foregoing figures and also matters of which we may take judicial notice are conclusive that the conditions existing on the Northern Pacific and the Soo are similar, both roads traversing virtually the same lignite field, and that of the two the Northern Pacific can carry at the least expense" (Vol. I, R., p. 24).

And again, at the bottom of page 26:

"We observe also that the average lignite haul on the balance of the road within this state, other than the Missouri river division, is but 23.13 miles, while that with the Missouri river division is slightly more than double this, or an average lignite haul of 47.46 miles. One need not to be a rate expert to realize that usually the longer the haul the greater the net profit, and that it is on the long haul the railroad is enabled to move the freight at the least cost per ton mile. The longer the haul the greater the volume per train load, the less breaking of trains and switching and the more accordingly that the road avoids the excessive cost of branch line service. In reality practically all of the haul of lignite by the Soo in this state is conducted at a cost equivalent to cost of branch line service" (Vol. I, R., p. 26).

3. Counsel seek to convey the impression that the court's finding that the revenues received by the Soo were not enough to pay operating expenses is based entirely upon the effect of the pro-rating section of the statute.

This conclusion is wholly unwarranted as the above excerpts show. The court found that pay-

ment of the operating expense of the Northern Pacific left substantially no revenues received from transportation of coal, even though that company got the long haul under the pro-rating statute and had the long haul in the traffic generally. It was found that the Soo had a greater operating expense with shorter loaded haul and the "short end" of the pro-rating traffic. At the bottom of page 27 it is said:

> "The evidence discloses that with the aggregate haul of lignite on the Soo averaging as it does approximately 35 miles only, and considering the large amount of this commodity it is compelled to deliver to connecting carriers to its injury, disproportionate to the injury of the receiving carriers through compulsory pro-rating, it is, as to nearly half the lignite business, virtually a branch line of the other two railroads in accumulating for them their lignite traffic. The pro-rating feature, therefore, on the facts, favors such connecting carriers to the injury of the Soo line" (Vol. I, R., p. 27).

It should be observed that at Wilton only one-half of the cars are delivered to the Northern Pacific under the pro-rating statute and on the other half the Soo receives all of the rate charged. What is said by the court on that subject is conclusive on the point under discussion. It is said at middle of page 21:

> "From this we can with reasonable certainty determine that another 2,500 cars of lignite handled on the Missouri river division, over and above the 2,532 cars used to make the lignite haul from Wilton to Bismarck on the Missouri river division, must also operate at either an actual loss or a non-compensatory rate. And comparing conditions and traffic of this road

with the Northern Pacific, operating in virtually the same territory, and considering that the average haul of this commodity clearly favors the Northern Pacific railroad while the empty car haul must be equal and probably greater on the Soo than the Northern Pacific, we are satisfied that as to the Missouri river division lignite must be carried at an actual loss under the statutory rate and its application to the actual conditions under which the traffic is handled. Certain it is that the balance of lignite traffic in the state is insufficient in volume and revenue to make the traffic as a whole more remunerative on the entire Soo road within this state as to all lignite carried than said lignite traffic is to the Northern Pacific road" (Vol. I, R., p. 21).

In the discussion of the law the court assumed that facts had been found showing no revenues to pay operating expenses. At the bottom of page 39 it is said:

"*Assume that when we find the fact to be* that this commodity has not paid its full proportion of the overhead and fixed railroad charges assignable to it, even though it does bring a return greater than the actual out-of-pocket costs of carriage, that we must thereby conclude in law that the commodity is carried at a loss to the carrier so that such fact may be a basis upon which confiscation can be predicated, still this alone is far from establishing that in law the statutory rate is shown to be confiscatory and void as an infringement of constitutional property rights. To stop here would be to assume a result that must not only be proven by evidence but established so clearly and convincingly as to leave no reasonable or substantial doubt as to the effect of the rate upon the whole earnings of which it is but a part when compared with and measured by the value of the property used in producing the

earnings accruing from the commodity rate. In other words, until the railroad has established by proof the existence of a general deficiency in intrastate earnings, or that the same will not pay a reasonable return upon the value of the railroad property used in producing such total intrastate return, it has not established its case, although it has shown a loss to ensue in the carriage of a certain commodity at a maximum statutory rate" (Vol. I, R., p. 39).

And again, at the top of page 42:

"*Conceding, however, that the findings concerning the Soo may serve as the basis of proof of confiscation*, if it be further established that the company is not earning a reasonable return upon all of its intrastate business when measured by the amount of its investment, that is, the value of its property within this state necessary to the earning of the revenue received, the company must also establish, to sustain its contention that the rate is confiscatory; (a) the amount of its total net earnings or net loss on its intrastate business" (Vol. I, R., p. 42).

4. At page 38 of the brief for defendant in error it is said:

"As to the Soo railroad it was determined that 60 per cent of the revenue was expended for out-of-pocket costs and that the amount received in excess thereof was a contribution to expense which the road would have had to bear had there been no lignite traffic whatever. So in this sense the hauling was done at a profit. In the sense that it did not contribute to the dividends it was done at a loss."

The language of the court on this subject is as follows:

"The court finds that the carriage of lignite

> coal increases the railroad expenses but sixty per cent of the usual statutory rate for the lignite haul; or, in other words, but 60 per cent of the full statutory rate allowed (as the freight tariff on lignite coal) is out-of-pocket costs therefor, or the proportion of the statutory rate made necessary to be expended because of said lignite haul, the remaining portion of the statutory rate and any amount in excess thereof as expenses arise from the apportioning to the lignite traffic of certain fixed charges or railroad expense that would have accrued had no lignite coal been transported. That all receipts from this traffic in excess of the out-of-pocket costs contributes toward payment of fixed expenses of the railroad that would have existed without this lignite freight movement and would have been borne by other freight instead of by lignite to the amount it has so contributed to its payment (Vol. I, R., p. 34).

This excerpt means, if we read it correctly, that the rate from Wilton to Bismarck, a distance of 28 miles, under the statute is 40 cents per ton and the transportation expense—not operating expense—is 60 per cent of that rate, but it does not mean that the "Soo" received that rate. On the contrary, the court found that the "Soo" only received 24.5 cents per ton for such haul (Vol. I, R., p. 20).

No importance can be attached to this statement unless it should be argued that as the carrier maintains the railroad anyway it would have all of the expense, except transportation expense, even if it did not transport coal, and, therefore, coal should bear no part of this burden. The court seems to have paved the way—in this excerpt—for such an argument.

5. In subdivision 5, page 3, and subdivision 7, page 68, of brief for defendant in error, the point seems to be made that nearly 70 per cent of the coal is transported over the Missouri river division, that as that is a branch line less profitable than the main line, the carrier is not entitled to insist on making a profit on such transportation.

The evidence shows that coal in North Dakota is transported (a) on through main line trains to some extent, (b) on local or way main line trains, and (c) on branch line trains. The transportation cost is greater in local main line and branch line than in through main line trains. Witness for plaintiffs and defendants took these differences into account in ascertaining transportation expense per unit, and the court did likewise (Vol. I, R., p. 12).

At the close of these computations as to all freight the court said:

> "The actual cost per 100 ton miles having been found at 5.18, 13.83 and 15.50 cents respectively, of the three classes of service, we find they compare as follows, using 100 per cent as the cost of main line through freight, viz: 100 for main line freight, 266 for main line way freight, and 299 for branch line freight; and that the relation in loads as to ton miles between main line through and main line way freight is as 1476 tons is to 669 tons, or as 221 is to 100. The foregoing is without reference to lignite traffic but merely to obtain the equated expense and relation between all freight" (Vol. I, R., p. 13).

Following the above figures the court found:

> "All of which, being the actual and equated mileage in the transportation of lignite coal

> for the fifteen months' period, is the equivalent of saying that the transportation of lignite costs 210 per cent of the equated ton mile cost of all freight" (Vol. I, R., p. 13).

These figures applied to coal resulted as follows:

> "Main line through actual car mileage, 129,648, at a relative cost of 100 per cent, yields 129,648 in equated car miles; 178,166 main line way car miles at 267 per cent yields 475,693 equated car miles; and actual car miles of branch lines, 38,387, at 299 per cent, yields 114,777 equated car miles, or a total of 346,201 actual car miles for main line through, main line way and branch lines, for an equated car mileage of 720,118, or the relationship of 100 to 208, equavilent to a finding that the transportation of lignite coal costs 208 per cent of the equated ton mile cost of all freight" (Vol. I, R., p. 14).

The above figures are from the findings of fact as to the Northern Pacific and they show the quantity of coal transported by (a) through main line, (b) local main line, and (c) branch line service. By reference to the findings of fact as to the Soo it was found that because of the short haul "in reality practically all of the haul of lignite by the 'Soo' in this state is conducted at a cost equivalent to cost of branch line service" (Vol. I, R., pp. 26-27). It will be noted "at a cost equivalent to cost of branch line service," not because it was branch line service but because of the shortness of the haul, the cost thereof was equivalent to the cost of branch line service. By reference to "Soo" Exhibit 1 (Vol. 3, R., p. 64), it will be seen that so far as Minnesota and North Dakota traffic is concerned, the Missouri

river division is just as much a main line as is either of the other two divisions. These references by the court are not based upon this division being a branch line in fact, but upon the fact that the shortness of the haul which precludes the handling of the cars in anything but local trains. It should be further noted that this same condition exists and the court's observations apply to the transportation of coal to Minot which is on the "Soo" main through line to the coast. Whether the haul is on main line or branch line is wholly immaterial, for the conditions in either case make the haul a branch line haul *so far as cost of transportation is concerned.* Usually a branch line is a feeder for the main line when the same carrier gets a longer and more profitable haul, but in this case the Northern Pacific and Great Northern got the long haul. The court on this point said:

> "The evidence discloses that with the aggregate haul of lignite on the Soo averaging as it does approximately 35 miles only, and considering the large amount of this commodity it is compelled to deliver to connecting carriers to its injury, disproportionate to the injury of the receiving carriers through compulsory pro-rating, it is, as to nearly half the lignite business, virtually a branch line of the other two railroads in accumulating for them their lignite traffic. The pro-rating feature, therefore, on the facts, favors such connecting carriers to the injury of the Soo line" (Vol. I, R., p. 27).

6. "The commodity affected is one of the lowest classes of freight and allowance should be made for that fact."

The above heading will be found at page 26 of brief for defendant in error.

It is here contended that the state court in finding the cost of the service in the transportation of coal first found the cost per unit of service of all business in the state and then applied this average cost of all business to the number of units of service performed in connection with the coal traffic, which counsel say deprived the state of low classification of coal.

This contention is not sustained by the facts. The court considered classification of different kinds of freight in determining the cost of transportation and fixed the cost of coal transportation after determining that question. At page 9, Vol. I, of Record, under the heading *"Train Operating Expenses,"* the court said:

> "This involves a computation from classification of freight with reference to (1) relative cost to all other freight of transportation of lignite; (2) the average tonnage per car; (3) the average haul; (4) the train movement, whether (a) main line through service, (b) main line way service, or (c) branch line service; in the consideration of all of which enters the proportion of empty car mileage to loaded car mileage. The computation which will take into account all the foregoing factors and yield the proportionate share of expense to be borne by this commodity as apportioned to the whole traffic is by the use of equated ton, car and train mileage, producing a relative cost from which, from known factors, the cost per ton mile of lignite coal can be determined, as tables in evidence show the manner of its carriage as to through, way and branch line freight, the number of cars handled, where received and where delivered, the mileage and tonnage of

each, the relative train loads and the empty car haul charged against the traffic, as well as the exact amount of wages paid and cost of fuel and supplies in all freight movement within the state" (Vol. I, R., p. 9).

After covering the subject fully the court closed the finding at page 15 as follows:

> "But the relation of cost of lignite haul to that of other traffic is as 100 is to 208, hence the $14,831.75 must be increased 108 per cent, or a total of 208 per cent thereof taken, which produces $30,850.12 as the actual cost of train operation to be apportioned to the lignite traffic under the railroad method adopted by both experts, or a difference in favor of the state on the computations of $296.64, occasioned by the application of the relation of 210 instead of the correct relation of 208 per cent as the relative cost of lignite to all other freight traffic. We find, then, that $30,850.12 was the approximate actual expense of train operation during the fiscal year properly chargeable against the revenue received from the lignite traffic haul" (Vol. I, R., p. 15).

The state has not presented to this court for review the question of whether the evidence supports the findings. The findings are conclusive on the subject.

LAW.

Time will not permit analysis of the decisions cited by counsel on the points made in our brief, but suggestions are made by counsel in connection with the facts referred to in subdivisions 4, 5 and 6, as numbered above under the heading of Facts Found. We will briefly refer to the same under the same numbers.

4.

As the revenues received were sufficient to pay the out of pocket or transportation expense, and as the other expense which the court found properly chargeable to the coal traffic would have been incurred anyway, therefore, confiscation is not shown.

The court's decision is based upon the theory that the carriers must show (a) that they do not receive a fair profit on all intrastate business, and (b) that the carriage of coal must substantially contribute to the losses on such intrastate business.

By this contention stated in the heading counsel in effect claim that if the revenues received from the coal traffic are sufficient to pay the out of pocket or transportation expense but lack thirty to forty per cent of enough to pay all operating expense found by the court to be properly chargeable to the coal traffic, confiscation is not shown even though the carrier is losing money on all of its intrastate business *because the operating expense other than transportation expense, would have been incurred had no coal been transported* and such other operating expense was chargeable to other traffic not involved in this controversy. This is the equivalent of saying that the state has the power to fix the rate on coal so low that the revenues will pay no operating expense other than transportation expense without regard to its profits or losses on all other intrastate business. It is in effect that the state may confiscate

property if it decides to do so. This is startling and the statement of the proposition is the complete answer to it.

If the carriers have the right to have the courts pass upon the reasonableness of a statute fixing the rate upon a particular commodity, it must follow in so doing that the operating expense incurred in the transportation of that commodity must be shown and when that expense is general and incurred in all of the transportation conducted by the carrier, that general expense must be apportioned between the specific traffic involved and all other traffic. This was done in these cases to the satisfaction of the trial court whose conclusions thereon are not questioned in this court. If we are not correct in this then there is no method by which courts may determine the reasonableness of a statute (a) fixing passenger rates, or (b) rates on merchandise, or (c) rates on grain, or (d) rates on live stock, or (e) rates on lumber. Indeed, courts would be precluded from considering the question of confiscation by statutes fixing all intrastate rates for the general expense must be apportioned between interstate and intrastate business in the determination of these questions.

5.

The Missouri River Division is a branch line and the Soo has no constitutional right to question the validity of a rate because the revenues derived therefrom will not pay operating expenses in the transportation of the commodity in question.

We have under this subdivision already pointed out the facts in this respect. Under such facts the decisions cited by counsel (pp. 68-72) have no application. Branch lines are usually conducted as feeders to the main line. They are not maintained for the revenues received on such line. The remuneration must come, if at all, from the long main line haul. When a question arises in the courts as to whether prescribed rates on such branch lines are confiscatory, the courts may very properly consider whether the rate for the branch line haul alone is remunerative for the services rendered and also the effect of the rate on the whole line of the carrier's road. As the branch line is but an aid to the main line traffic, they should be treated as one.

There is no room for this doctrine in this case. By reference to the above excerpts from the court's findings, it will be seen that the court found that so far as "cost of transportation" was concerned, the "Soo" operated under branch line conditions, i. e., with so short a haul that the transportation could not be conducted in through trains and with the connecting line having the longer haul. It was a branch line indeed, but a branch line for the Great

Northern and Northern Pacific that got the longer haul and not a branch for the "Soo" main line and to its detriment, not to its benefit, as is usually the case in branch line service. It will be observed also that the court found the service into Minot was as to cost of service branch line service, although Minot is located on the main Pacific Coast line of the "Soo" road and the coal was transported over that line (Vol. I, R., p. 27). Counsel by this discussion have injected into the case a point that does not belong here.

6.

"The commodity affected is one of the lowest classes of freight and allowance should be made for that fact."

Under this subdivision we have shown that the court classified all freight with reference to cost of transportation thereof and gave to the coal traffic its proper place in the classification. Counsel have at length (pp. 26-38) considered the right and duty of a carrier to classify the freight by it transported so as to make the charges commensurate with the services rendered; the right of shippers to insist upon such classification and the power of commissions to compel the same. The reasoning of the courts in the cases cited is conclusive. The proposition is so manifestly right and just to both carrier and shipper that the rule could not well be otherwise.

These decisions are on a line with our position.

The duty of the carrier and the right of the shipper and the power of the commissions all arise from the same source. The carrier has undertaken to carry. It is implied that the charges shall be reasonable—reasonable to the carrier that they shall be adequate as compensation for the services rendered, and reasonable to the shipper so that he shall not be required to pay more than the services are worth. This of itself secures the same service for the same price to all alike. This is the fundamental principle upon which the whole relation of carrier and shipper is based. Regulations by the state that secure the observance and enforcement of this relation and the protection of the parties thereto answer the requirements of justice and right and as we believe reach the constitutional limit.

Respectfully submitted,

A. H. Bright,
John L. Erdall,
John I. Dille.

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No. 421

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 981.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA, EX REL T. F. McCUE, ATTORNEY GENERAL.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA, EX REL T. F. McCUE, ATTORNEY GENERAL.
Defendant in Error.

STATEMENT.

The state court made certain findings of fact, the character of which is indicated in the language of the court as follows:

> "Separate findings are made as to each carrier. Instead of formulating the usual ultimate findings of fact we have made them evidentiary as well." Transcript, Vol. I, p. 7).

As these findings must be gathered from the entire opinion it is deemed desirable here to bring the salient points together to the end that the conclusions of the court may be readily and correctly interpreted. From a review of the decision insofar as it relates to the Soo road it is apparent that the court found facts as follows:

1. That the proof offered and submitted by this company was lacking in essential data or factors neces-

sary to a satisfactory computation by the court as to the cost of service rendered to lignite coal, and on the whole entirely inadequate to establish the cost of carrying lignite coal with the clarity and certainty requisite in a case of this character. (Transcript, Vol. I, pp. 19 and 20).

2. The loss of from $9,000 to $12,000 represents in large measure the difference between the amount received for carrying the coal and the amount which it would have received had the coal been delivered to purchasers at Bismarck without pro-rating with connecting carriers. It is not a determination in dollars and cents representing the difference between the cost of handling the traffic and the revenue derived therefrom, but a figure arrived at by the court largely from extraneous sources, namely, evidence and statistics furnished by the other defendant carriers and comparisons and estimates based thereon.

3. Where the results on other divisions are considered, the loss, so-called, which contributes to the total mentioned by the court, is found, not by taking from the total amount received the certainly deduced cost of transportation, but by taking the amount received from what would have been earned had there been no pro-rating with connecting carriers. (Transcript, Vol. I, p. 26). In other words the loss, so-called, is derived by subtracting what the road had remaining after dividing receipts with connecting carriers on a pro-rating basis from what it would have earned under the statutory rates prescribed had the coal been shipped to the connecting point, *at the rate for that point*, rath-

er than by finding that the actual cost of the services rendered in the lignite traffic in fact exceeded the amount actually derived from that traffic. (Transcript, Vol. I, pp. 21, 23, 25, 26, 27, 28, 34 and 35). Therefore the loss, as we have indicated, is traced, not to the insufficiency of the statutory rate, but to the prorating feature of the statute. In fact this is called the teeth of the statute. (Transcript, Vol. I, p. 35).

4. It is true that at p. 23, Transcript, Vol. I, there appears to be a cost deduction. However, it is based upon assumptions and arbitrary factors to such an extent that it cannot be looked upon as an accurate cost analysis and does not seem to be treated as such by the court.

5. That about three-fourths of the lignite traffic handled by this road is handled on the Missouri River division under conditions which are abnormal in this: a. This division is unusually expensive in operation and less remunerative generally than any of the other divisions of that road. (Transcript, Vol I, p. 21). b. It is further unusual and abnormal in that a very large percentage of the coal carried on that division is delivered to connecting carriers. (Transcript, Vol. I, pp. 21-25, 27, 34 and 35).

6. The only well-defined finding of fact covering the relation between the actual expense of hauling lignite coal and the statutory rate is the one to the effect that the carriage of lignite coal increases the carrier's expenses but 60 per cent of the usual statutory rate for the lignite haul. That is, but 60 per cent of the full statutory rate al-

lowed is required to defray the out-of-pocket costs, or the amount actually or necessarily expended because of the lignite haul, while any expense in excess of these apportioned to the lignite traffic are fixed charges or railroad expenses that would have accrued had no lignite coal been transported. Hence all receipts from this traffic in excess of the out-of-pocket costs contribute toward payment of fixed expenses of the railroad that would have existed without the lignite freight movement and would have been borne by other freight instead of by lignite to the amount that it has contributed to their payment. (Transcript Vol. I, pp. 34 and 35). Thus, the court finds that the revenue derived under the statutory rates pays all expenses actually and directly incurred by reason of the lignite traffic while from 30 to 40 per cent of it remains to be applied upon the general expenses of the railroad which would have accrued had there been no lignite traffic whatever. To this extent therefore it is found that the revenues lighten the burden which would otherwise be borne by other freight.

7. That this railroad has not established the value of its property within the state of North Dakota properly assignable to its intrastate business, nor has it offered any evidence of the value of that part of its property justly assignable to the lignite coal traffic. (Transcript Vol. I, pp. 34, 42, 44-49).

8. That the road has failed to show by competent evidence that there is a net loss or an insufficient return on its intrastate business as a whole. (Transcript, Vol. I, p. 42). Nor is there anything to show, if there

was a loss in that business or an insufficient return therefrom, that it was materially contributed to by the carriage of this one commodity.

Concerning the traffic on the Northern Pacific road the findings appear to be:

1. That the net earnings from the lignite business for the period in question were $847.61 out of aggregate earnings amounting to $58,953.07. (Transcript, Vol. I, p. 33).

2. That no proof was submitted as to the value of the railroad property employed in producing the intrastate earnings of the company. (Transcript, Vol. I, p. 43.) Nor as to the value of the property employed to produce the lignite earnings. (Transcript, Vol. I, p. 44).

And generally it is found that the statute prescribing these rates is a declaration by the state of a public policy intended to encourage industry and commerce and to promote the general well-being and public good. (Transcript, Vol. I, p. 36).

ARGUMENT.

The argument in behalf of the plaintiffs in error proceeds upon the assumption that the decision of the court is rested solely upon the doctrine that before a state-made rate can be held confiscatory it must be shown not only that it is in itself non-compensatory but that its effect is to make non-compensatory the entire intrastate business of the carrier.

The scope of such a rule furnishes an inviting field for debate and argument in these cases, but if so broad

a rule was announced by the state court it is not the rule which was actually applied.

The state court in its opinion adheres to the rule announced in these cases upon the former hearing, 19 N. D. 45, 120 N. W. 869, in the following language:

> "The proper test as to whether the rates thus fixed are reasonable or unreasonable is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of transporting the same, but whether under such rates it will be enabled from its total freight receipts from all its intrastate traffic to earn a sum above operating expenses, reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment."

This does not amount to saying that a carrier may be compelled to carry a commodity at a rate so low that the actual outlay incident to the carriage exceeds the amount of revenue derived therefrom. In fact it is expressly stated in the same opinion that it is unnecessary to decide whether a rate upon a special commodity is invalid when it is so low as to entail a positive loss to the carrier insofar as the transportation of the commodity is concerned. It does not announce either expressly or by implication that the police power is unbridled and without limitations. The view of the carriers in these cases appears to be that since the carrier is ordinarily entitled to a reasonable profit upon its entire intrastate business it is likewise entitled to a like

profit upon each service rendered. This is virtually saying that the right to profit upon each service performed or each commodity carried is *property* within the meaning of the Fourteenth Amendment to the Constitution. Hence every rate which is not compensatory would, by virtue of that rule, be confiscatory, and the test of compensation would be the margin of profit to which the carrier is entitled upon its business as a whole. In this way if a commodity is carried without any margin of profit whatever, or if, as in the Northern Pacific case, there is a margin of profit which is assumed to be less than upon the business as a whole, the rate would be deemed non-compensatory and ipso facto confiscatory. This makes non-compensatory rates, under all circumstances, unreasonable and confiscatory.

The contention of the state is that the rule is not iron-clad and inelastic; that a non-compensatory rate is not necessarily confiscatory; that there may be, and there are, circumstances under which a rate which does not yield a profit or which returns a margin of profit less than is returned by the business as a whole, may yet be reasonable in view of all the surrounding circumstances. And a material consideration favorable to the validity of such a rate is that mentioned by the state court, viz.: that the entire intrastate business yields a fair and reasonable profit upon the investment devoted thereto.

It may be that a rate which does not yield a profit, or which produces a lower return than that received from the business as a whole, in certain cases, would

be confiscatory. This, however, depends upon the attendant facts and conditions existing in each case. In other words, the rule is elastic. It may be that a carrier may claim a right to a rate on each commodity sufficiently high, considering the character of the commodity and the service rendered, to protect against positive or actual loss. Concededly the power to regulate is not unlimited. The same is true of the right to a profitable return upon an investment. It has never been held by this Court so far as we are able to find, that a rate for a service which will produce a return lower than is returned generally upon an entire business is necessarily unreasonable, nor that it is unreasonable because it returns no profit whatever.

It is true that in *Smyth vs. Ames*, 169 U. S. 466, the general proposition is laid down that railroads are entitled to a fair return upon the capital invested, but it is not held that this is an unqualified right. On the contrary the Court announces in the same opinion that the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by the highway are reasonably worth That is to say, the right to profit is a contingent right. Rates made by legislative authority should afford a profit. There are, however, considerations paramount to the claim which stockholders have to dividends. Consequently rates, under certain circumstances and conditions, may be valid though they afford no profit whatever. Cases may readily be conceived where this is true even of an entire schedule of rates. The percentage of return is therefore not the sole criterion by

which to measure the reasonableness of a rate. The very character of the business of a railroad is such that it necessarily must submit itself to interferences and regulations which the interests of the public require, for the property devoted to this business is not private in the strictest sense. This fact underlies the whole principle of rate regulation and compels, as a test of the reasonableness of a rate, not alone the amount of profit with which the carrier is rewarded but also the value of the service rendered. That is, the rights of the public in an investment of this kind are to be weighed with the rights of the owner of the property involved. And this Court has gone so far as to say that, "the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

Smyth v. Ames, 169 U. S. 544; 42 L. ed. 842.

In *Mpls. & St. L. Ry. Co. vs. Minn.* 186 U. S. 268; 46 L. ed. 1158, it clearly appears that if the railroad cannot earn a fair return upon the value of that which it employs for the public convenience without at the same time burdening the public with exorbitant rates the right to earn dividends must give way to the paramount right of the public to have its service rendered for what it is reasonably worth.

The question was considered in *Covington & L.*

Turnpike Road Co. v. Sanford, 164 *U. S.* 578, 596, 597; 41 *L. ed.* 560, 567, where it was said:

"When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them

which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of the property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs."

In *Reagan v. Farmers Loan & Trust Co.* 154 U. S. 362, 412; 38 L. ed. 1014, 1028, this language was used:

> "It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested some money in the building of a road is conclusive that the tariff is unjust and unreasonable."

Such was the view taken in *San Diego Land & Town Co. v. National City*, 174 U. S. 757; 43 L. ed. 1161.

It is therefore manifest that a public service corporation may not as a matter of right lay absolute claim to a profit from the conduct of its business. A profit is guaranteed only when its return is consistent with justice to the public. Whether it is a property right depends upon the facts in each case. If a reasonable rate does not secure an adequate return upon the investment that is a "misfortune" "which the Constitution does not require to be remedied by imposing unjust burdens upon the public." This means, that though rates under which a carrier is operating are not compensatory it does not follow inevitably that they are confiscatory. If reasonable in the light of all considerations bearing upon them they may then be reasonable though not remunerative.

Such is the rule announced in *Smyth v. Ames* and *Reagan v. Farmers Loan & Trust Company, supra*, as applicable to an entire schedule of rates. If true as to an entire schedule the rule necessarily applies with

greater force to a single commodity rate, as in the cases at bar. A circumstance which may justify a state-imposed rate of this kind is an adequate return from the entire intrastate business. So the state court held, and in each of its opinions rendered in these cases it analyzed and discussed other considerations entering into its decisions and weighing in favor of the validity of the rates.

In view of all these considerations the rate to which objection is made is well within the limits of the doctrine that the special facts controlling a case may warrant a rate or even a schedule of rates whose operation fails to produce a profit. In fact the rule announced by the state court, so vigorously attacked by counsel, is more favorable to plaintiffs in error than the rule stated by this court in *Smyth vs. Ames* and *Reagan v. Farmers Loan & Trust Company*, i. e., under the rule of the state court, the carrier in any event is protected: 1, in its reasonable profit on its intrastate business as a whole; 2, if a state-made commodity rate is found so low as to materially contribute to bringing the whole intrastate schedule below the compensatory mark, then such commodity rate is unreasonable and confiscatory. While under the rule of this court conditions and circumstances may be such that an entire schedule of rates may be non-compensatory, yet reasonable and just.

On principle, then, the doctrine of the state court is not a vicious one since, under the rule of either court, each case must rest upon its own peculiar facts, thus sufficiently safeguarding and circumscribing the opera-

tion of the rule. Under it the reasonableness of a rate is always an open question dependent upon the particular surrounding circumstances. The doctrine we submit is the logical outgrowth of the cases which we have cited, and has been recognized in the reasoning of this Court in the cases to which we shall now refer. The first case touching the point is that of *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649; 39 L. ed. 567. The court follows with approval the conclusion of the supreme court of Arkansas in the same case in 54 Ark. 101; 11 L. R. A. 452, to the effect:

> "That the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expense and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legtimate expense under the operation of the [illegible] within the limits of the State of Arkansas."

As was said by the state court in its former opinion, 19 N. D. 45; 120 N. W. 869:

> "Upon parity of reasoning, it would seem that the carrier may not be permitted to single out one commodity and insist that the tariff of rates for the transportation of the same is unreasonable and confiscatory, without being required to show that under the operation of such rates it will be unable to derive from its entire freight business within the state just and reasonable profit."

In *Mpls. & St. L. Ry. Co. v. Minn.*, 186 U. S. 257; 46 L. ed. 1151, a case where the court had under consideration certain coal rates prescribed by the Railroad and Warehouse Commission of Minnesota, the following language is used:

> "Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the rate would not pay its operating expenses, it may well be that the existing rates upon other merchandise which are not disturbed by the Commission may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."

And further:

> "While we have never decided that the Commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a

fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular."

Regarding these quotations together and in connection with the statements made regarding the fixing of disproportionately low rates by the carriers themselves for purposes of ultimate profit, we believe it natural and logical to infer therefrom that while, as is said in the opinion, each case must be determined by its own considerations, a carrier may under certain conditions be compelled to carry a commodity though it derive little or no profit from so doing. Else why should it be deemed an argument against the theory of the carrier in that case that possibly the rates on merchandise not disturbed by the commission are sufficiently high to earn a profit to the company, though it earn little or nothing upon coal in carload lots.

One of the conditions justifying such a rate is the ability of the carrier to earn a fair profit from its entire business. This case makes it clear that a carrier is not entitled to a uniform rate of return or profit from each commodity carried or services rendered. If in view of the return from the entire business the profit from one item may be reduced below the rate of return deemed adequate as a whole, logically all profit upon such item may be entirely eliminated.

This appears to be the interpretation placed upon this decision by the court in later cases in support of which it is cited. In *Interstate Consol. Street Ry Co. v. Mass.* ... L. ed. 115; 207 U. S. 79, a case testing a statute requiring street railway companies to transport

school children at a reduced rate, Mr. Justice Holmes, speaking for the court, says:

> "Whatever the fare, the statute, fairly construed, means that children going to or from school must be carried for one-half the sum that would be reasonable compensation for their carriage, if we look only to the business aspect of the question. Moreover, while at may be true that in some cases *rates or fares may be reduced to an unprofitable point, in view of the business as a whole, or upon special considerations (Mpls. & St. L. R. Co. v. Minn.* 186, 257, 267; 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900), it is not enough to justify a general law like this that the companies concerned still may be able to make a profit from other sources for all that appears."

The statute in question then was sustained on other grounds, but the language quoted is a clear concession that in some cases, rates or fares may be reduced to an unprofitable point in view of the business as a whole, or upon *special considerations*, and in support thereof cites the case of *Mpls. & St. L. R. Co. v. Minn.* The Court's attention will be hereinafter directed to such considerations in these cases.

Furthermore, in *Wilcox v. Consol. Gas Co.* 212 U. S. 19; 53 L. ed. 382, 400, Mr. Justice Peckham, in the opinion of the Court, used the following language:

> "We cannot see from the whole evidence, that the price fixed for gas supplied to the city by wholesale, so to speak, would so reduce the profits from the totals of the gas supply as to thereby

render such total profits insufficient as a return upon the property used by the complainant. *So long as the total is enough to furnish such return, it is not important that, in relation to some customers, the price is not enough. Mpls. & St. L. R. Co. v. Minn.*, 186 U. S. 257; 46 L. ed. 1151; 22 Sup. Ct. Rep. 900. *Atlantic Coast Line Ry. Co. v. N. Car. Corp. Com.* 206 U. S. 1; 51 L. ed. 933; 27 Sup. Ct. Rep. 585."

The case of *Atl. C. L. R. Co. v. N. Car. Corp. Comm.* 206 U. S. 1; 51 L. ed. 933, applies the principle to another form of service. That case did not involve the reasonableness of railroad rates, but rather the validity of an order requiring the carrier to render a particular service. It nevertheless is authority for the contention of the state in these cases to the extent that upon certain considerations and under certain conditions the state, under its power to regulate, may compel the doing of an act, or the rendering of a service, which forces the carrier to suffer pecuniary loss, one consideration being the "productiveness of the corporate business as a whole." And this is held to be so under the facts found by the court below even if tested by the doctrine applicable to an entire rate scheme as announced in *Smyth v. Ames*. It lays emphasis also upon the primal duty of a carrier to the public and holds that in certain cases the carrier may be required to forego some of its usual rights that the interests of the public may be furthered and satisfied.

It concedes "that if a scheme of maximum rates was imposed by state authority, as a whole adequately

remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the lines of just classification, and amounted to a creation of a favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment." And further that a like repugnancy to the Constitution would arise "from an order made in the exercise of the power to fix a rate when the result of its enforcement would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor, even if, considering the rates as a whole, a reasonable return from the operation of its road might be received by the carrier."

These concessions, of course, do not control the case and are therefore valueless as indicating the opinion of the court as to the merits of the propositions conceded. Though these were accepted as an expression of the Court's view it still, in a given case would have to be determined under what circumstances the "limits of just classification" are transcended; when the "flexible limit of judgment which belongs to the power to fix rates" is exceeded; what, within the meaning of the concession, constitutes a "loss;" when a "favored class" is created; what amounts to a "wholly inadequate compensation." In other words, it might in

spite of the propositions conceded still be true that a carrier could be compelled to carry a commodity under a prescribed rate which does not contribute to profit so long as its entire business is adequately remunerative because particular considerations justify such a rate.

From the foregoing cases it seems fairly well established that in passing upon the reasonableness of a rate the interests both of the public and of the owner of the property are to be considered; that in the final analysis the rights of the public are superior, those of the carrier subordinate; that unusual rates will not be upheld simply that stockholders may earn dividends; that each case must be controlled by attendant facts and conditions; that in a determination all circumstances that fairly have a bearing upon the rights of the carrier and of the public must be weighed; that there are considerations upon which a carrier may be required by the state to handle a commodity or render a service which does not contribute to its dividends; that a very important if not the sole consideration warranting the imposition of such a rate is the fact that the business of the carrier as a whole is remunerative; and that therefore a rate may be non-compensatory without being confiscatory. This is in reality the doctrine applied by the state court in these cases. The construction or interpretation which that court has placed upon these authorities has likewise been placed thereon by other courts.

In *Matthews v. Bd. of Corp. Com.* 165 Fed. 7, 10, it was said in this connection:

> "I must be borne in mind that the Supreme Court of the United States, in deciding whether the rates fixed under legislative authority violated the Fourteenth Amendment, do not rest their judgment on one set of rates for specific articles, but they take into consideration all the rates on all articles and decide whether, as a whole, the result is unreasonable." (Citing *Smyth v. Ames.)*

Such was understood to be the law by the court in *Southern Ry. Co. v. McNeill,* 155 Fed. 756, where it was said that a railroad is not entitled to earn a profit on every mile of its road nor upon every article carried by it, but is entitled to earn a reasonable profit upon the entire intrastate business in the state.

Again, in re *Arkansas Railroad Rate Cases,* 168 Fed. 730, where a passenger rate was in question, the court says that it is well settled that for the purpose of determining whether rates are confiscatory or not all sources of revenue must be considered, citing in support of this statement *Mpls. & St. L. Ry. Co. v. Minn.; Seaboard Air Line Co. v. Fla.;* and *Atl. C. L. R. Co. v. N. C. Corp. Comm.,* and from this it is concluded that the increase earned from one class of traffic will justify a corresponding decrease in another class, if net earnings from all sources are compensatory. P. 731.

In a later case, *Arkansas Rate Cases,* 187 Fed. 307, it is again said:

> "The law is well settled that rates made by a commission on one or more commodities so low

as to be non-compensatory for the transportation of those particular commodities, does not justify an interference by the court unless it is shown that these rates would reduce the net earnings of the carrier on its entire business to an extent that they would cease to be compensatory."

In addition to the cases heretofore cited, the court cites, *N. P. Ry. v. North Dakota*, 216 U. S. 579; 54 L. ed. 624, and *Ry. Co. v. Gill.*

The same interpretation has been placed upon these decisions by the state courts.

Southern Ry. Co. v. Atl. Stoveworks, 128 Ga., 223; 57 S. E. 429.

Jacobson v. Wis. M. & P. Ry. Co. 71 Minn. 519; 49 L. R. A. 389; 74 N. W. 893.

State ex rel Taylor, v. Mo. P. Ry. Co. 76 Kan. 467; 92 Pac. 606.

People ex rel Cantrell v. St. L. A. & T. H. Co. 176 Ill. 512; 35 L. R. A. 656; 52 N. E. 292.

State ex rel McCue v. N. P. Ry. Co. 19 N. D. 45; 120 N. W. 869; 25 L. R. A. N. S. 1001.

A similar view was taken by the Interstate Commerce Commission in *Louisville & Nashville Railroad Coal & Coke Rates*, 26 I. C. C. R. 220, a coal case. And the same is true of other writers:

Wyman, Public Service Corporation, Section 1201.

Freund, Police Power, Section 551.

3 *Encyc. S. C. Rep.* 632.

It appears also from an examination of the reports of this court that in many of the rate cases which in

recent years have been brought to the court it has been argued in reliance upon the cases we have cited that confiscation cannot be predicated upon a single rate or group of rates, but must be judged from the effect on the entire business done within a state. We are aware of course that the interpretation which inferior courts and writers and attorneys have placed upon the decisions of this court are not binding upon it. They do, however, indicate a widespread understanding that the law is settled as applied by the court below.

It is contended on behalf of the plaintiffs in error that the doctrine which we believe to be deducible from the foregoing decisions was repudiated by this court in *Interstate Commerce Comm. v. Union Pacific Ry. Co.* 222 U. S. 541; 549; 56 L. ed. 308. Such a conclusion, however, is not justified by the language quoted. It is merely stated that the fact that the carrier earns dividends, sheds little light on the question whether the rate on a particular article is reasonable, for if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. The language does not define what constitutes a "reasonable rate." Obviously, a carrier cannot be compelled to haul goods for nothing. As is said by Chief Justice White in *Interstate Commerce Commission v. N. Car. Corp. Commission, supra*, such a suggestion is "extreme." But so far as this case discloses, a reasonable rate might be one paying the portion of taxes, operating expenses and fixed charges

apportionable to the commodity carried without contributing a cent to dividends, or it might be a rate, such as that suggested by the Interstate Commerce Commission in the *Louisville & Nashville Railroad Coal and Coke Case*, 26 I. C. C. R., 20, which pays only out-of-pocket costs.

The doctrine cannot be said to have been repudiated by this court upon the former writ of error in these cases simply because the carriers were ordered to make a trial of the rates with leave after such trial to reopen the cases for further proof. Under the theory of the state a rate may be non-compensatory yet within the limits of just classification and reasonable, all things considered. On the other hand it may be non-compensatory and exceed the limits of just classification and thus be confiscatory, everything considered.

The state has never argued, and the court below does not say that a single rate cannot be questioned simply because there is sufficient return from the business as a whole. No one now contends for such a doctrine. That there is a "limit" to the power to fix rates is conceded, but it is a "flexible limit," varying with circumstances. When that limit is exceeded the power exercised ceases to be regulatory and becomes destructive. But this excessive exercise must be made to appear beyond doubt. This was not done upon these cases in the first hearing. It was consistent with this doctrine to give to the carriers, an opportunity to show, if they could do so, that the rates were confiscatory.

Neither can it be said that the question is determined adversely to our view here by *Interstate Commerce Commission v. Stickney*, 215 U. S. 98; 54 L. ed. 112. The question discussed appears not to have been considered by this court at all. Even the decision of the court below in that case is not authority here, for the reason that the proposition contended for by counsel for the Commission there was much broader and more far reaching than is needed to sustain the rates here in question. Besides it was not a case where other reasons could be urged to justify a commodity rate failing to contribute to dividends.

Again in *Mo. K & T. Ry. Co. v. Interstate Commerce Commission*, 164 Fed. 645, the court merely announces the broad principle that a rate may not be established for a carrier that will not admit of such compensation for the service rendered as under all the circumstances is just and reasonable to it and to the public. There is no intimation that a rate upon a specific service must, under all circumstances, yield profit. Nor does the court say what in a given case shall be deemed to constitute a profit, nor what compensation is just and reasonable to the carrier and the public.

And in *Pennsylvania Ry. Co. v. Phil. County*, 220 Pa. 100; 68 Atl. 678, the court was passing upon the rates prescribed for a great branch of the carrier's business and not upon the rate for a particular commodity comprising a small part of its traffic. Neither were there involved in that case circumstances or conditions which might in a given case justify the rule applied by the court below.

Under this rule the rates in question do not contravene the rights guaranteed to the carriers under the Federal Constitution. The carriers suffer no direct loss by reason of the service rendered in carrying the commodity. There is a margin of profit which would obviously be extended upon an exact analysis of cost. The returns from the business as a whole are adequate. Besides, there are special considerations which warrant the imposition of the rates. These considerations we shall now discuss.

1. *The Intrastate Business of These Carriers as a Whole Produced a Fair Return.*

This was conceded upon the trial and the court below found that the carriers did not show that by reason of the reduction in the rate upon the coal, they were made to suffer a loss upon their intrastate traffic or an insufficient return beyond what it otherwise would have been. (Transcript Vol. I., p. 42). And the argument of the carriers here proceedds upon the theory that the entire intrastate business is fairly remunerative. The property of the carrier devoted to their North Dakota business is therefore not being confiscated by reason of the reduction in coal rates, whatever may be said as to the percentage of profit the roads would derive from the property properly assignable to the coal traffic were an assignment made to that traffic.

2. *The Commodity Affected is One of the Lowest Classes of Freight And Allowance Should be Made for that Fact.*

Another consideration weighing in favor of the

reasonableness of these rates is the character of the traffic affected thereby. In a rate case the starting point must be found in a determination of the cost assignable to the traffic touched. In making the comparison in these cases between the cost of service to the coal traffic and the revenues derived therefrom the carriers determined cost to them per unit of service of all business of the company conducted in the state and then applied this average cost of all business to the number of units of service performed in connection with the lignite traffic. With the exception of a few details of minor importance the particular character of the service rendered was only casually discussed in the evidence and the character of the commodity hauled only slightly considered. The state has contended throughout that the analyses made of defendants' cases and the exhibits and arguments submitted in its behalf show a considerable margin of profit over the cost of handling the lignite business, even on the basis of a general level of cost for all business. And the computations made by the state court indicate that its determination is of like character. (Transcript, Vol. I, pp. 21 and 22). These results are arrived at without taking into consideration at all the character of this commodity or the principle of classification.

We direct attention here to the necessity of considering in connection with all of the other elements in the cases the character of the commodity and the service rendered for the reason that this is a basic consideration or factor in rate making. To hold that

these rates are unreasonable because the evidence submitted in behalf of the plaintiffs in error shows that upon the basis of an average cost for all freight the lignite coal rates are unremunerative and confiscatory, would necessitate entire disregard of the principle of freight classification. In fact the failure to weigh in any degree the kind of article carried under the rates only adds to the uncertain character of the evidence adduced upon the subject of cost in behalf of the carriers. The charging of lignite coal per ton with a burden equal to that charged for every other ton of freight in intrastate business can no more be justified than a rate upon that coal equal to the average rate per ton upon all freight. In other words if the principle of classification is a prime consideration in the making of a rate it is equally important in the assignment of cost when the reasonableness of rates is in question. This must be so and is in reality the underlying reason for the principle of classification.

> "Classification is recognized as a necessary method of adjusting the burdens of transportation equitably upon the various articles of traffic in view of differing circumstances and conditions, and but for the necessity of such adjustment, considerations based alone on weight and distances of haul would probably determine rates except as modified by competition. This method, while securing practical uniformity, would probably deprive many articles which are now important factors in commerce of the benefit of transportation to distant points."

F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Ry., 6 *I. C. C. Rep.* 66.

For this reason, the great number of articles commonly offered for transportation are classified. Those resembling each other in character, use, value, volume, bulk, weight, risk and expense of handling being generally placed in the same class and given the same rate. The purpose of this scheme is obviously to place upon those articles of greater value, requiring the greatest amount of service and care in shipment, and imposing the greatest risk upon the carrier, a higher proportion of the burden of expense than is placed upon commodities of comparatively low value, entailing small risk, little care and a lower grade of service in their transportation. The principle underlying it is well illustrated in *Interstate Commerce Commission v. Chicago, Great Western Ry. Co.*, 52 L. ed. 705, where it was held that a rate on packing-house products lower than that on livestock was justifiable because of the difference in the cost of carriage, the risk or injury and the larger amount which companies are obliged to pay in damages upon the latter.

It is also well stated in *Kansas City Southern Ry. Co. v. Carl*, 57 L. ed. 683, 227, U. S. 638: "The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. Thus in Gibbons v. Paynter, 4 Burrows, 2298, it was said by Lord Mansfield: 'His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be in proportion to the risk.'"

The necessity of classification, for convenience in the fixing of rates and the conduct of transportation business, has been universally recognized by common carriers, and in fact was in use by them in the administration of their business long before the regulation of railway rates was undertaken by the federal and state governments of this country.

2 Wyman Public Service Corp. Sec. 1232.

Beale & Wyman Railroad Rate Regulation, Sec. 554.

Brief consideration of the characteristics of lignite coal will show the injustice of allotting to it a cost determined without regard to such characteristics. The expense of handling the commodity is low. Special equipment is not necessary. The carrier neither loads nor unloads the cars. These facts justify a lower rate than might be otherwise demanded.

Tift v. Southern Ry. Co., 138 *Fed.* 264.

Louisville E. & St. L. Cor. Co. v. Wilson 132 *Ind.* 517; 32 *N. E.* 311.

Trades League of Philadelphia v. Philadelphia, Wilmington & Baltimore Ry. Co., 8 *I. C. C. Rep.* 368.

Am. Central Ins. Co. v. Chicago & Alton Ry. Co., 74 *Mo. App.* 89.

Hayes v. a. Co., 12 *Fed.* 309.

Again, it is carried in carload lots, in loads considerably heavier than the average. That a reduction should be made in its rate for this reason is well stated as follows:

"Shipment by the carload goes direct to the destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to the different consignees along the line. Only one bill of lading is made which requires but one entry upon the way bill. The time occupied in transporting it to destination is far less than in the case of a shipment in L. C. L. quantities. There is but one collection of charges for freight. Where the shipment is made in L. C. L. quantities, a separate receipt or bill of lading has to be given to every shipper for his parcel, and separate entry for every item has to be made on the way bill. The shipment is by local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railway company. There are as many collections of charges for freight as there are different parcels. The time occupied for transporting it is usually from two to three times as long as in the case of a carload shipment—according to distances. It occupies a whole car and for the vacant space in that car the company is receiving no compensation."

Wyman, Pub. Service Corp. Sec. 1348.

It is also a commodity which requires much less than ordinary care.

"Coal is among the most desirable kinds of traffic. The reasons for this have been several times stated by the Commission, and need not be repeated here in detail. The cost of receiving, transporting and delivering that commodity is less than in case of almost any other article of freight. Its value is not great. The hazard of loss in transit is insignificant. It is an article of universal necessity in daily life and as a steam fuel it furnishes the basis of many other industries. Coal rates in this country are usually highly competitive, and this fact, together with its reliability as traffic, and the large quantities which are moved, has produced on the average a very low rate."

Dennison Light & Power Co., v. Mo. Kan. & Tex. Ry. Co. 10 *I. C. C. Rep.* 337.

Tift v. Southern Ry. Co. supra, and Same, 10 *I. C. C. Rep.* 548.

Further, it is a commodity of low grade. The greater the value of the article carried, the greater the liability of the carrier as an insurer of freight and the greater its consequent risk in the transportation.

Schumacher Milling Co. v. Chicago, R. P. I. & P. 6 *I. C. C. Rep.* 61.

Cox Bros. & Co. v. Lehigh Valley Ry., 4 *I. C. C. Rep.* 535.

Indeed so important a factor is this that a difference of rates between bituminous coal and anthracite coal has been justified. In *Cox Bros. and Company v. Le-*

high Valley Railroad, 4 I. C. C. Reports, 535, Commissioner Morrison said:

> "The grounds upon which we are asked to find these two coals to be the same freight, a like kind of traffic, is that they are loaded, unloaded and transported in the same way and substantially at the same expense to the carrier, though one-half or more of the anthracite is used for domestic purposes.
>
> "Ordinarily there is no better criterion for reasonable charges than that which is in proportion to the service rendered; and if the cost and expense of the carrier was the only test of a reasonable charge the claim might well be made that all coals should be classed together as one freight and be subject to the same transportation charges.
>
> "Carriers in making separate classifications, or rates for different coals, take into consideration not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets."

It needs no argument to see that the cost of carrying a commodity of this type is much less per unit than is that of all freight, yet the average cost of (transporting) all freight is that applied in these cases. A very large part of the freight carried requires more service than coal and is vastly more expensive to

handle. This greater expense of course adds decidedly to the average cost per unit of all freight and makes it higher necessarily than it would be if no freight required any more service than coal. The use of such a factor is not fair to coal. A rate on lower grade freight yielding the average received on all freight is deemed unjust. *Colorado F. & I. Co. v. Southern Pacific Ry.* 6 *I. C. C. Ry.* 489. It is equally so to make a lower freight bear the average cost of all freight.

Tift v. Southern Ry. Co., supra.

Interstate Commerce Comm. v. Chicago, Great Western Ry. Co., 141 *Fed.* 1015.

It is, therefore, a commodity handled at a minimum of expense; loaded by the shipper and unloaded by the consignee; carried in carload lots in loads averaging on the different lines from six to eight tons in excess of the average loads of all freight; it does not call for special equipment; requires no care in transportation and is of low value, entailing, so far as the evidence shows, no insurance risk whatever.

The elements of classification are therefore all to be considered in fixing the share of the entire burden of charges which ought reasonably to be borne by the lignite coal. The service being of a low character as compared with the service rendered for a large part of the other freight traffic, the proportion of the expense assigned to the lignite traffic should be correspondingly low. In other words, so long as commodities are classified for the purpose of ratemaking, and therefore of return for service, there should be a corresponding

classification of costs in order that the charge made for cost of service in any computation shall be fairly proportioned to the service rendered, and consequently to the compensation received. A lucid discussion of this principle is found in the opinion of Commissioner Lane in the *Matter of Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chespeake & Ohio Railroad Company, et al*, 22 I. C. C. Rep. 604, where it is said:

> "Is a rate unreasonable because it does not pay its full share of taxes, fixed charges and dividends? At the end this is the question to which we come in this case. The carriers themselves having fixed these rates under the mandate of the law that they shall fix just and reasonable rates, have they justified higher rates by showing that the existing rates which they had fixed fall somewhat short of meeting all the related expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property? Let us see where this doctrine would lead. If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the

tariffs of every railroad in the United States must suffer a revolutionary change. In all classification, consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase "what the traffic will bear." It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may

reasonably bear a higher rate than the other upon public grounds. It must be, therefore, that this Commission, under the amendment to section 1 passed by Congress in 1910, giving to us the control of freight classification, has power to determine the reasonableness of the differences that are made between the rates made applicable to the various kinds of commodities transported. We may not say that a rate shall be fixed so as to meet the requirements or needs of any body of shippers in their effort to reach a given market, nor may we establish rates upon any articles so low that they will not return out-of-pocket cost. Neither could we fix an entire schedule of rates which would yield an inadequate return upon the fair value of the property used in the service given. There is, however, a zone within which we may properly exercise "the flexible limit of judgment which belongs to the power to make rates." These are the words of the Chief Justice of the Supreme Court, 206 U. S. 126. There is no flexible limit of judgment if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested. The recognition of such a doctrine has never been suggested either by Congress or the Supreme Court. A just and reasonable rate must be one which respects alike the carrier's deserts and the character of the traffic. It cannot be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's

> expense, nor is it one which compels the shipper to yield for the transportation given a sum disproportionate either to the service given by the carrier or to the service rendered to the shipper. The words "just and reasonable" imply the application of good judgment and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms."

Upon the first trial of these cases the state court took into consideration the principle of classification. In the results announced by the court in its last opinion the principle was not given effect. . (Transcript Vol. 1, pp. 22). In weighing the adequacy of the return from the coal traffic it should not be overlooked that of necessity the class of freight compels a lower assignment of cost than is made when all freight is considered. Since allowance has not been made in apportioning cost, fairness demands that it be made in passing upon the sufficiency of the return.

2. *The Revenues Derived from the Traffic Exceed the Actual Outlay Incident Thereto.*

The state court found that the Northern Pacific railroad has a margin of profit over and above all expenses amounting to $847.61. This result was obtained after assigning to the traffic a portion of fixed charges including taxes. (Transcript, Vol. I, p. 19). To the extent of this amount then the traffic was held to contribute to dividends.

As to the Soo railroad it was determined that 60 per cent of the revenue was expended for out-of-

pocket costs and that the amount received in excess thereof was a contribution to expense which the road would have had to bear had there been no lignite traffic whatever. So in this sense the hauling was done at a profit. In the sense that it did not contribute to the dividends it was done at a loss.

In weighing these conclusions as to returns it must be remembered that the class of freight involved was not considered in assigning cost. The principle of classification means necessarily that there must be more or less diversity in the amount of return which may be claimed from different kinds of freight. In a consideration of the reasonableness of a rate then the cost of the service rendered must be so classified that there is assigned to each service such a proportion of expense as fairly reflects the kind and value of the commodity carried and the responsibility of the carrier in transporting it. Since the cost of service was not classified in these cases, the return of out-of-pocket costs, with a margin besides, should be deemed a fair and just minimum return in view of the fact that there is no other method by which the principle of classification may now be applied. This we submit fairly reflects the proportion of the expense of the carrier which should be borne by the coal business, as one of the lowest classes of freight.

Because of the extreme difficulty, to which the witnesses testified in these cases, of determining with particularity the cost apportionable to a single commodity, it is only just that the return of the expenses incurred in handling the commodity be accepted as

representative of a reasonable minimum within which "the flexible limit of jujdgment which belongs to the power to fix rates" be exercised; otherwise, important considerations will be entirely ignored.

This rule was applied by the Interstate Commerce Commission in *Louisville & Nashville Coal & Coke rates*, 26 I. C. C. R. 20. . In the opinion by Commissioner McChord, the following is laid down as regards the charge which may be made to the commodity involved:

> "From these figures the carrier estimates under present rates that the cost of moving coal and coke via Louisville is from 99 to 118 per cent of the revenue, while the Commission estimates the cost at from 71 to 82 per cent of the revenue. We realize that there is no exact method of so separating the accounts of a carrier as to determine exactly what is the cost of moving any particular portion of its traffic and that the best that may be accomplished is an appropriation. This has been done by two methods in this proceeding, with the result stated.
>
> However, it should be borne in mind that the costs as here figured include practically all of the costs except return upon capital account. It has been roughly estimated that of the total costs only about 50 per cent are what may be termed out-of-pocket costs—that is, the cost of fuel, wages of crews, and repairs to locomotives and cars. The other 50 per cent is made up of salaries of general officers, way and structure ac-

count, etc., to which the carrier would be subject, whether or not the particular commodity moves. . In other words, when the carrier claims that the cost of moving the coal is 4 mills, the actual outlay on the part of the carrier for the particular business is not much in excess of 2 mills. .

Anything above the out-of-pocket cost of hauling is a contribution to general expenses, and to that extent tends to relieve rather than burden other traffic. While cost is an important element in determining the reasonableness of freight rates, it is not controlling, and we do not think a reasonable maximum rate is ipso facto only such a rate as pays a fixed distributive share of all operating expenses.

So long as freight is classified this cannot be, and the preservation of that classification calls for the exercise of "the flexible limit of judgment which belongs to the power to fix rates. 206 U. S. 26."

Such a holding is consistent with basic principles of rate making and these principles are logically the basic consideration in determining the reasonableness of rates; otherwise the return upon all commodities would be based upon a level of cost and such basis would utterly disregard the traditions and experience of railroad management.

The argument that a commodity rate is unreasonable because loss is shown when the commodity is charged with the average cost for all freight, is the

converse of the argument that a rate is unreasonable because if applied to all classes of freight it would result in confiscation. This was expressly condemned in *Mpls. & St. L. Ry. Co. v. Minn.* 186 U. S. 2668, where the court said:

> "Obviously such a reduction could not be shown to be unreasonable simply by proving that if applied to all classes of freight it would result in an unreasonably low rate."

For like reason a rate cannot be shown unreasonable simply by proving that a low class of freight does not return the amount per unit handled which is required to meet the expenses per unit of all classes of freight. Especially must this be so where the commodity to which the rate applies is one of the very lowest kinds of freight and the amount carried so small that it is practically negligible when compared with the entire intrastate freight business. Of course, if coal constituted the bulk of intrastate freight, its low cost would reflect in the general average. But that is not the situation here.

4. *The Enactment of the Statute was a Declaration of Public Policy by the State, in Favor of a Domestic Industry and the General Welfare.*

In view of the returns upon the intrastate business of the plaintiffs in error as a whole and other attendant circumstances these rates may be justified as a declaration by the state of a policy intended to favor a domestic industry and to further the well being of its people. The following facts concerning the natural and geographic conditions of the state were established upon

the first hearing in these cases as appears by the consolidated record therein which was made a part of the record in these cases. (Consolidated record, pp. 110, 112, 113, 119 and 124): That the state is almost entirely a prairie country; that it is without fuel supplies except as fuel is imported from the forests or the mines of other states or of its own mines; that there are within the confines of the state and particularly in the western portion thereof vast deposits of lignite coal; that this coal is suitable for use as a fuel; that though suitable for this purpose it is essentially a lower grade of fuel than the bituminous coals of Pennsylvania and the anthracite of the same section; that it carries a larger percentage of moisture than the coals mentioned and loses more in shipment by evaporation than do these coals; that prior to the taking effect of the act in question the consumption of the eastern coals in this territory was very great; that the freight rates then in force did not take into consideration the difference in value either actual or as fuel between the lignite and other coals; that this tended to retard the development of the lignite coal industry; that this industry is in its infancy; and that in the opinion of those interested in the development of the industry before the taking effect of the act a reduction in rates which would take into consideration the difference in value between lignite and other classes of coal consumed in the state would have a tendency to increase the consumption of lignite coal and develop this industry. .

Upon this situation and the enactment of the statute in question the court below remarks:

> "We are led to here remark the fact of the legislative rate being a declaration by the sovereign power of this state on a matter of public policy. Importance must be given to the situation as disclosed by the facts of which the court will take judicial notice, and concerning which legislation in the public interests and founded upon public policy has been as here declared. The central and western portions of this state are underlaid with lignite coal beds, the mining of which for fuel is as profitable as a mining enterprise as it is an economic advantage to the consumers who must in this climate use coal six months out of the year. Thus necessity creates an industry and a market. It would seem that the development of both must redound to the benefit of the common carriers, here as ever the connecting link between the producer and the consumer. It is easy to see that the strangulation of the mining and distribution of this coal, or the confining of it by exorbitant freight rates to as limited an area and therefore as small a market as possible, must temporarily operate to the great advantage of the common carriers and against the public welfare of the people of this state proportionately, inasmuch as those who cannot burn lignite fuel must, on these prairies, otherwise devoid of fuel, buy the eastern coal which has increased in cost from 100 to 200 per

cent between the mines in Pennsylvania and the point of its distribution to the consumer, half of which undoubtedly arises from freight charges, as in this instance, as always, the old adage proves true that 'the consumer pays the freight.' As against the incentive for avarice of those benefited by freight rates and urging in this review of this commodity rate the right to dividends from the earnings of every commodity carried, the legislature in its wisdom, exercised in the interest of sound public policy, has fixed by statute the maximum rate and the statute must be looked upon as the legislative expression of a public policy intended to encourage industry and commerce and promote the general well-being and public good under the obvious benefits arising therefrom. It may be that to a greater or lesser extent public policy enters into the fixing of every rate statute or rate regulation, but it would seem to be here present to an unusual degree. Of course questions of public policy may enter into every statute in the same sense as here present and may be assumed as the reason for interference with state-fixed rates only where the clearest proof makes it necessary to protect private constitutional rights from state infringement. But no harm can come from in passing remarking its presence here." Transcript, Vol. 1, p. 36.

In the light of the circumstances mentioned in this quotations, the history of the act and its obvious pur-

pose, the rates in question should be held reasonable, though they are so low that the defendants derive little or no profit from the traffic. In this behalf it must be borne in mind that the reasonableness of a rate cannot be determined without reference to the interests of the public. The carrier's calling is of a public nature. It is one into which a person or a corporation cannot be compelled to enter involuntarily. It has been repeatedly declared by the courts of this country that in determining the justness or unjustness of the rate prescribed by a legislature or a commission, it is necessary to consider not only the rights of the carrier, and of those interested therein, but the rights of the public as well.

It was said in an early case, *Covington & Turnpike Road Co. v. Sanford*, 164 U. S. 569; 41 L. ed. 566:

> "It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use the turnpike road, and consequently a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The public may not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

Later, in *Smyth v. Ames*, 169 U. S. 467; 42 L. ed.

819, the court, discussing the same subject, uses the following language:

> "A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs the function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is, therefore, under governmental control, subject, of course, to the constitutional guaranty for the protection of property. It may not fix its rates solely with a view to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for transportation of persons or property on a railroad were exacted without reference to a fair value of the property used for the public, or of the services rendered, and in order simply that the corporation may meet its operating expenses, pay interest on its bonds, and declare dividends to its stockholders."

It is therefore settled that in consideration of the rights, interests and welfare of the public, a rate may be imposed by the rate-making power without regard particularly to the question of its contribution to profits. A consideration of this kind is the well defined public policy underlying the rates prescribed by the act in question, despite our assumption that they do not contribute to dividends, and in that particular,

compel pecuniary loss on the part of the carriers. Upon this point we call attention to the scope of the power invoked in rate regulation.

This power, its source and character, were fully considered in *Munn v. Ill.* 94 U. S. 113; 24 L. ed 77. Since that time it has been settled that property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. The source of this principle is found in the common law, as long since announced by Lord Hale. In its application it is held that common carriers exercise a sort of public office and have duties to perform in which the public is interested.

The foregoing case has been authority, now universally accepted, for a broad and broadening interpretation of the police power vested in the states. In *Budd v. New York*, 117 N. Y. 1, 621, 5 L. R. A. 559, the New York Court of Appeals, through Judge Andrews stated that the criticism to which the Munn case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power, and in that behalf says:

> "There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in

> dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement, which have been felt and responded to in the halls of legislation."

This view was approved by this court in its review of the same case, 143 U. S. 517; 36 L. ed. 252. The power, so defined, "inherent in every sovereignty," authorizes the enactment of legislation and the formulation of rules designed to meet the growing needs of society.

> "The very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one

of the main purposes of government; but no one holds his property by such absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all."

People v. Budd, supra.

The power of states to regulate within their limits matters of internal police, includes in that general designation, *whatever will promote the peace, comfort, convenience and prosperity of the people (Escanaba Co. v. Chicago,* 107 U. S. 678; 272 L. ed. 445), and is not limited to regulations pertaining to the health, morals or safety of the public.

In *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S. 292; 43 L. ed. 706, relating to a legislative act of the state of Ohio requiring trains to stop at certain stations, the following language was used:

> "Now it is evident that these cases (the cases cited) had no reference to the health, morals or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the constitution, all questions arising within the state that *relate to its internal order, or that involve the public convenience,* are primarily for the determination of the state, and that its legislative enactments relating to these subjects and which are not inconsistent with the state constitution, are to be respected

> and enforced in the courts of the Union, if they do not, by their operation, directly intrench upon the authority of the United States or violate some right protected by the national constitution."

And further:

> "It may be that such legislation is not within the police power of a state, as those words have been sometimes, although inaccurately, used, but in our opinion the power, whether called police, governmental or legislative, exists in each state by appropriate enactments not forbidden by its own constitution or the constitution of the United States to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the *public convenience and the public good.*"

It thus appears that the police power keeps pace with the progress of society and that it is broad enough to authorize and sustain legislation designed to satisfy growing public necessity and increasing social wants. Its adaptability to changing conditions and to prevailing ideas as regards measures deemed promotive of the public good is most forcefully expressed in the opinion in *Noble State Bank v. Haskell,* 219 U. S. 112; 55 L. ed. 116, a case involving the constitutionality of the Oklahoma statute providing for the guaranty of bank deposits:

> "It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. *It may be put forth*

> *in aid of what is sanctioned by usage, or held by the presiding morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort, probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce.* One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

Under the power of regulation, thus broadly interpreted enactments of different character have frequently been upheld as its valid exercise in the interest of the common good, though it has imposed upon the public service corporations affected, hardship and inconvenience even to the point that financial loss inevitably ensued.

In *Gladson v. Minnesota*, 166 U. S. 427-430; 41 L. ed. 1065, the Court had before it for review an act of the legislature of Minnesota requiring all regular passenger trains to stop at all county seats within the state. The following is the reasoning of the court:

> "A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road

connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and *may make any other reasonable regulations for their management in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public.* All such regulations are strictly within the police power of the state."

Upon that particular proposition which we are here considering, the right of the legislature to enact a statute prescribing rates with a view to promoting the welfare of its people by developing an industry within its borders, the following is particularly pertinent:

"The legislature of the state may well treat it as one important object of establishing a railroad within the state that public officers, parties to actions, jurors, witnesses and citizens generally should be enabled to more promptly reach and leave the centers to which their duties or business shall call them, to require every regular passenger train running wholly within the limits of the state, to stop at all stations, at county seats directly in its course, for the few minutes and at the trifling expense needed to take on and dis-

charge passengers with safety, as a reasonable exercise of the police power of the state, and cannot be considered a taking of property of the company without due process of law."

If the legislature may well treat it as an important object of establishing a railroad within the state that officers and interested parties may be able to reach the county seats of the several counties therein, it may equally well treat it as an important object of establishing such road that the people of the state shall be enabled to secure from the mines within its borders a supply of fuel which should insure them against famine and suffering. And with the same logic the legislature may well consider it as one of the important objects of bringing these railroads into existence, or of authorizing them to transact business within the state, that the potential industries within the state should be fully and completely developed. Considering the railroads as important factors in such development, the legislature may properly take into consideration in fixing rates upon coal, the difference in value between the lignite coal which will constitute the bulk of the coal traffic, and other coal with which it must necessarily compete, and which is so largely an article of interstate commerce that it only indirectly feels the effect of rate regulation by the state. The principle applied in the cited case need not be stretched an iota to uphold the legislation here attacked.

In another case, *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, an act of the state of Minnesota requiring track connections at the intersec-

tion of railroads, was considered. . It was claimed by the carrier that considerable financial loss would result thereto by reason of the legislative requirement. While the court says that a statute or regulation is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved, and that in many cases questions of degree are the controlling ones by which to determine the validity or the reverse of legislative action, the statute was upheld as a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself. .

Again, in *Atl. C. L. R. Co. v. N. Car. Corp. Comm.* 51 L. ed. 933, an order of the corporation commission requiring the carrier to restore a connection with a certain point within that state, was before the court. It was contended that the traffic was such that the extra train which would necessarily be reinstated would impose financial loss. The order was declared valid because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness as would be the case where the whole scheme of rates was unreasonable.

under the doctrine of *Smyth v. Ames*. It is stated that the fact that pecuniary loss is incident to the furnishing of the facility ordered, is an important criterion to be taken into view in determining the reasonableness of the order, but that it is not the only one, for the reason that "as the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required and the public need for its performance.."

To the same effect is *Interstate Consol. Street Ry. Co. v. Mass.*, supra, in which an act requiring a street railway company to transport school children for one-half fare was upheld. Upon the point, Mr. Justice Holmes says:

> "The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights, like others, are matters of degree, and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation. *Martin v. Dist. of Columbia*, 205 U. S. 135, 139; 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; *Camfield v. United States* 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864.
>
> "If the 14th amendment is not to be a greater

> hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

Under these authorities it was competent for the legislature to determine that the public welfare of this state required the measure fixing the rates on coal which would put the producers of lignite coal upon a basis of equality with the producers of higher grades of fuel, for the purpose not only of obviating future fuel shortages and the hardship and suffering incident thereto, but also for the purpose of developing industries dependent upon a bountiful fuel supply, and generally improving the commercial and economic conditions within the state. The legislature having considered the act desirable, "analogy and principle are in favor of the power to enact it" because "usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce," and sustaining what is deemed "greatly and immediately necessary to the public welfare."

Only recently, in upholding a laundry license act of the State of Montana, this Court has given recognition to the right of a state to carry out a definite policy favorable to certain industries, or forms of industry. Upon this point the court says:

"A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. *McLean v. Arkansas*, 211 U. S. 539, 547. *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92, 95; *Williams vs. Fears*, 179 U. S. 270, 276; *W. W. Cargill, Co. vs. Minnesota*, 180 U. S. 452, 469. It may favor or discourage the liquor traffic, or trusts. The criminal law is a whole body of policy on which states may and do differ. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair. And if again it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller vs. Oregon*, 208 U. S. 412. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to employment that

> our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state."
>
> *Quong Wing v. Kirkendall*, 223 U. S. 62.

The power of classification or discrimination which a state may exercise in dealing with its local interests has in this case been logically applied. Such power is clearly defined in *American Sugar Refining Co. vs. Louisiana*, cited in the quotation. The prescribing of rates for coal by the legislature of this state is the declaration of a policy with reference to certain interests for the purpose of furthering the general well-being of its people. The act prescribing the rates is in itself an act of classification in the sense in which that term is used in the cases above cited. Unquestionably the coal mining industry might be favored by revenue laws of the state for the very reasons prompting the enactment of the statute in question. Now, if that industry may be favored through the instrumentality of revenue or taxation statutes, it may with equal logic, and subject to the same limitations, be favored by means of the regulation of railroad rates, for the power to regulate rates of public service corporations is as clearly one of the inherent powers of sovereignty as is the power to impose taxes and exact revenues.

Considerations of economic and industrial advantage in rate-making are therefore proper. In *Southern*

Ry. Co. v. Atlanta Stove Works, 57 S. E. Rep. 434, such rates were upheld as an adaptation to meet special economic and industrial conditions in certain localities. The right of the state to encourage or foster an industry by the establishment of certain rates was recognized by the Interstate Commerce Commission in *Cobb v. N. P. Ry. Co.*, 20 I. C. C. Rep 100, although effect was not given thereto insofar as they affected interstate commerce, for the reason that the commission was without authority to give such effect. In another case it was stated that "the industrial and economic conditions of a city may be taken into consideration in determining the reasonableness or unreasonableness of a rate on a commodity contributing to the industrial welfare of such city, as compared with the rates on the same commodity to competing points." *G. N. Ry. Co. v. C. M. & St. P. Ry. Co.*, 5 I. C. C. Rep 571. And in the *Matter of Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio Ry. Co.*, et al, heretofore cited, it is said that in all cases consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than others.

Having the right to enact a law favoring a certain industry, it was for the legislature to determine the necessity of such enactment, and having determined the question of its propriety it is concluded here, unless it be so utterly unreasonable and extravagant in its nature and purposes that the property and personal rights of the defendants are unnecessarily and in a

manner wholly arbitrary interfered with or destroyed without due process of law. The fact that the court may differ with the legislature in its views of the policy adopted affords no grounds for judicial interference.

McLean v. Arkansas, supra.

The rates in question are not nominal merely. Under the most unfavorable view which may be taken of them, or which has been taken of them in these cases, they concededly permit the return of all out-of-pocket costs, and in addition contribute to general expenses. We maintain that they pay the full share of all expenses which can properly be assigned to the coal traffic considering the class of the commodity carried and leave a liberal margin of profit. The act prescribing them is therefore not vulnerable to the objection that it expresses a policy "arbitrary, unreasonable or extravagant" in its nature. Rather, it is the expression of a policy intended to secure and further the welfare and comfort of the people of the state, and to develop and upbuild its industrial and commercial resources and possibilities. In aiming at these commendable ends it imposes no hardship upon the carriers required to operate under the rates prescribed. It denies them no returns which they may reasonably demand upon their investments, and in no way deprives them of a fair and reasonable profit upon the entire business done by them within the state.

5. *The Value of the Property Used in the Intrastate Business was not established.*

It is well settled that in determining whether the

And further:

> "The allowances made below for conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses, contingencies and interest during construction."

In the light of these principles the state court found the evidence of value entirely inadequate. (Transcript, Vol. I, pp. 44, 45 and 46). In fact under the authority of the last rule the total value of the Soo property in North Dakota, concerning which evidence was submitted, is reduced by at least one-half. (Transcript, Vol. I, p. 45).

Further than this, apportionment of value was not made to the intrastate business. It was held in *Smyth v. Ames*, and *Simpson v. Shepard* that the reasonableness of intrastate rates must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. Under the claim of the carriers that they should earn a fair profit upon each commodity, there should have been a further apportionment of value between passenger and freight business and thence an assignment of value to the coal business so the rate of return thereon could be ascertained. Otherwise the percentage of profit cannot be shown. This was not done.

While the Soo Railroad did attempt to assign value upon the gross earnings basis this is no longer recognized as an apportionment at all. It is out of question since the decision in *Simpson v. Shepard*, 230 U. S. 459. The Court there said:

> "The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness it now challenged. Doubtless, there may be cases where the facts would show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods. But this case is not of that character. In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the 'value of the use,' and therefore proper. But it would seem to be clear that the value of the use is not shown by gross earnings. The gross earnings may be consumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profit, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue. * * * If the property is to be divided ac-

cording to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value."

Since no other attempt was made to assign value to the intrastate coal business the very "basis of calculation" necessary to a proper determination of the case on the carriers' own theory is lacking.

The Northern Pacific Railroad made no attempt whatever to prove the value of the property used by it in its North Dakota business. (Transcript, Vol. I, p. 49). In view of the finding as to this road that after apportioning to the coal traffic a share of all expenses, including general expenses and taxes, there is a margin of profit amounting approximately to $900.00, it seems that consistently with its theory as to profit upon a commodity business the value of the property used in handling the traffic should have been determined.

It is contended in behalf of the railroads and especially the Soo railroad, that this is a case where the rates are so low upon any reasonable basis of valuation that there can be no doubt as to their confiscatory nature. It is not made clear, however, how confiscation can be made to appear unless there is a starting point from which to determine it, and this, under the authorities, is the value of the property "used for the convenience of the public."

In the Soo case it was found that the margin of error in the estimated value of the property devoted to that railroad's entire business in North Dakota is obviously very large under the principles laid down in

the Minnesota cases. It was held in *Wilcox v. Consolidated Gas Company*, 212 U. S. 19, that where there is a very narrow line of division between possible confiscation and proper regulation the material fact of value should not be left in doubt. In these cases either the property is plainly not being confiscated, or the line of division between confiscation and regulation is narrow. In the view most favorable to the carrier the determination was necessary.

6. *The Coal Business is in Itself Negligible.*

The total ton mileage on the Northern Pacific Railroad of all freight for the year in question was over 700,000,000, while for coal it was 9,380,678. That is, the coal represented about 1.3 per cent of the total business. (Transcript, Vol. I, p. 10). In fact it was said by counsel for the railroad in the court below that the commodity might be carried for nothing without materially affecting the company's revenues. (Transcript, Vol. I, p. 44).

On the Soo railroad the total ton mileage of all freight for the year in question was 250,000,000, while the total ton mileage of coal for the same period was 8,564,038, or a trifle over 3 per cent of the total intrastate business. (Transcript, Vol. III, p. 119), (Transcript, Vol. I, pp. 23 and 24).

A business constituting so small a part of the intrastate business of the carrier is not of sufficient consequence, so long as it reimburses the carrier for all of the expense incident to it to warrant a holding of confiscation when the entire business done by the carrier is found profitable. As was suggested in *Louisville & Nashville Co. v. Ry. Comm.*, 208 Fed. 35, 52:

"It is conceivable that the reduction of a specific rate may be inconsequential in its effect on the entire intrastate business or at least of not sufficient consequence to constitute confiscation."

This is exactly the situation here.

7. There are Certain Conditions Peculiar to the Soo Road which Contribute to the Unfavorable Operation of the Rates.

Another consideration which is applicable to the Soo road in particular is the fact that its Missouri River division is the most expensive to operate and the least remunerative of any division of that railroad. (Transcript, Vol. I, p. 21). In fact the density of the freight traffic on the division was shown to be less than one-half that of the entire line. As was found by the court, a very large percentage, about three-fourths, of the entire lignite traffic is handled on this division, and, as is said, the conditions are not so favorable for transportation on that division as on the Northern Pacific railroad. While upon the entire line of this carrier within the state the coal business constitutes 3 per cent of the traffic, it appears that on the Missouri River division it constitutes over 18 per cent. (Transcript, Vol. III, p. 121). (Transcript, Vol. I, pp. 22, 23 and 24). And upon that line within the state, exclusive of the Missouri River division, where the traffic conditions are presumably normal and justly comparable with the traffic conditions on the Northern Pacific road, the coal business amounts to .8 of 1 per cent only. (Transcript, Vol. III, p. 122).

It must be remembered also that the Missouri River

division is treated by the court below in its computations as a branch line and for that reason the operating expense of the division per unit is made a trifle more than double the main line cost of the same kind. (Transcript, Vol. I, pp. 22 and 23).

This carrier, then, is asking to have these rates declared confiscatory because it happens that most of the traffic handled under the rates is carried on a division of the road, which is in fact a branch line, where it constitutes about 1-5 of the entire traffic handled, and upon a portion of the line which regardless of the large volume of low grade freight is concededly the most expensive to operate.

If the business under such conditions is not profitable that is not in itself evidence that the rates are unreasonable or confiscatory. This was determined in *St. Louis Ry. Co. v. Gill*, 156 U. S. 665. The fact that unusual traffic conditions exist may not itself justify the fixing of a rate at a point where it will secure to the carrier the usual margin of profit. That is, the conditions may be so unusual that the value of the service will not warrant a rate which is compensatory in the generally accepted sense. In such a case, of course, the rights of the public will outweigh the usual right of the carrier to compensation for the use of its property. Such a circumstance was contemplated by this Court in *Reagan vs. Farmers Loan & Trust Company*, 154 U. S. 362, where the Court said:

> "There may be circumstances which would justify such a tariff (a tariff failing to produce profit); there may have been extravagance and

the needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers resulting in general loss; the construction may have been made at a time when materials and labor were at the highest; the road may have been unwisely built in localities where there is not sufficient business to sustain a road. Doubtless too there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road."

In the *Arkansas Railroad Rate Cases*, 168 Fed. 732, the court discussed unusual conditions affecting the revenues of certain roads. The court said:

"It would hardly be proper for the court to say that such roads are entitled to as great a compensation on their investments from intrastate business as the ordinary roads built for the accommodation of the intrastate business as well as the interstate business. As is well known, some of the Pacific roads traverse the deserts for hundreds of miles through strips of territory where there is practically no intrastate business, either freight or passenger. Would it be proper in such cases to hold that the road shall have the right to charge for the intrastate traffic in that section tariff rates high enough to enable it to earn a certain fixed percentage on its investment? Would not, in such a case, the rates have to be so high as to be confiscatory of the property of the

residents of that state? Must the public guarantee the railroads a certain income on their investment, regardless of the conditions of the country traversed, or whether bad judgment was exercised in the selection of the route. We do not think so. New lines or branches to increase the business of the main line or the exercise of bad judgment in the building of a road are to be considered in determining what rates would be fair and just to the corporation as well as to the public."

A similar view is expressed in the same cases in 187 Fed. 304.

SanDiego Land & Town Company vs. Jaspar, 189 U. S. 439, 446; 47 L. ed. 892.

The traffic conditions on this road generally are similar to those on the Northern Pacific. (Transcript, Vol. I, p. 24). This being so, if the coal business was normally distributed over its entire line the result of its carriage under these rates would be more favorable to the carrier and in all probability would meet not only all expenses which might be assigned to the coal traffic, but would contribute to dividends as was found to be the case upon the Northern Pacific railroad. In fact, this is shown (Transcript, Vol. I, p. 22) where on a main line basis the cost per car is found to be $4.75 as against a return of $6.63. If so, it follows that if the returns from the business are, under existing conditions, insufficient to contribute to dividends, that fact is attributable directly to the unfavorable conditions to which we have referred under

which the carrier must operate as regards this commodity. In that event justice does not require that a further burden be imposed upon the public. Under normal conditions the commodity business would add something to dividends. In spite of this abnormal situation it was determined that of the revenues received from the coal business only, 60 per cent. was required to meet the actual outlay incident to it, while what remained was a contribution to general expenses.

8. *The Cost of the Service Rendered has not been Satisfactorily Established in the Case of the Soo Railroad.*

For the purposes of this discussion we assume that the rules governing the judicial determination of the validity of a schedule of rates should be applied where a commodity rate is involved.

It is no longer open to question that in testing the validity of rates the carrier complaining of their unreasonableness is burdened with showing the cost of the business affected by them. For failure to make such a showing carriers have been repeatedly turned from this court without relief.

Northern Pacific Railway Co. v. State, ex rel McCue, 216 U. S. 579; 54 L. ed. 624.

Seaboard Air Line Railway Co. v. Florida, 203 U. S. 261, 51 L. ed. 175.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257; 46 L. ed. 1151.

Simpson v. Shepard, 230 U. S. 352; 57 L. ed. 1151.

The court found as to the Soo railroad that the statistics of the carrier are merely estimates so that definite calculations are impossible. And this relates to "all of the tables of statistics furnished." Upon this point the court says:

> "We are satisfied that this railway company has furnished all the statistics at its command tending to throw light on whether the lignite traffic is carried within this state at a profit or at a loss. But the statistics in the main amount to but estimates, inasmuch as the known bases are wanting from which to make definite calculations. This is understood and practically admitted by the railway officials themselves. The testimony of Mr. Tombs, auditor and leading statistician of the defendant company, in the examination conducted by the railroad's own counsel virtually admits the impossibility of arriving at the cost of carriage of this commodity from the statistics at his disposal, and that any result must be merely approximate and deductions from the statistics concerning the operation, expenses and profit of the whole system instead of that portion of the system within this state, and must of necessity be too indefifinite to be classed as even an approximate result of the cost of transportation of this commodity. (Pages 122 and 133 of abstract). We have examined all of the tables of statistics furnished and are forced to the same conclusion. And this necessarily rejects in toto the gross earnings theory which

counsel for this railroad have endeavored to sustain as applicable under its proof. The gross revenue method is properly applicable to the determination of certain matters such as the expense for taxation, where a true relation exists between the basis taken and the result sought. It is possible that if this was a case to determine a commodity rate applicable to the entire Soo system, with the commodity moving with a reasonable uniformity over the entire system, or under conditions not peculiar to a particular locality, that the gross revenue theory might be of value. But to determine the reasonableness of a freight rate on a single commodity moving within a prescribed radius of two hundred miles from the place of its production, and that wholly within a single state and of no greater amount or proportion of the total traffic than that of lignite coal, and with no basic figures except gross expenses and gross earnings, it is impossible to gtt even approximate results. At best they must amount to mere estimates. To illustrate, under the application of the revenue basis as made by the company in Tables No. 2, 3, 4, 5 and 6, Group A., and other tables into which the deductions are carried, all coal carried during the summer months returns a profit regardless of the rate, while all coal carried during the six other months of the year must return a loss even though the rate be twice that of the summer months."

In spite of the unsatisfactory nature of the proof

submitted upon this point the court considered certain data in the record and announced some general conclusions regarding the lignite traffic. The discussion of the evidence from which its conclusions are drawn indicates very clearly that there is present therein, and necessarily so, a considerable element of estimate and speculation. In fact, definite conclusions are conceded to be impossible and the computations made assume to cover the issues only in part. The result arrived at is therefore hardly so impressive as it otherwise would be.

The figures shown at p. 23 of the Transcript, Vol. I, indicate the conjectural nature of the findings of cost. Assumed factors are the basis of calculation.

An analysis of the statement that there was a loss of from $9,000.00 to $12,000.00 during the test year indicates that it can scarcely be counted a loss at all. It is derived from a comparison of what the road earned with what, under certain conditions, it might have earned. (Transcript, Vol. I, pp. 25, 26 and 27). Such a comparison obviously should be made between what was received and what the service cost or what it was worth. Any rate, however high, could be condemned on this reasoning. If the statutory rates were trebled the amount this carrier, as the initial carrier, would lose under the conditions existing in these cases by this standard would be increased in the same proportion. Such a test obviously cannot measure the loss to the carrier resulting from the rates. It rather shows the effect of pro-rating. According to this reasoning the carrier, on the basis of a 40 cent rate

for 28 miles, the distance the commodity is carried on the Soo road from Wilton to Bismarck, and 62 cents for 100 miles, would lose, on 100 tons carried 100 miles, over connecting carriers, $22.64. It may be assumed for the purposes of demonstration that 40 cents per ton represents the cost, or the value of the service, of carrying a ton of coal 28 miles, so that the loss of $22.64 mentioned would represent the loss incident to what is termed by the court, "compulsory pro-rating." Now, if the rates were trebled, the amount received for hauling a ton 28 miles would be $1.20, while for hauling it 100 miles it would be $1.86. For carrying 100 tons 100 miles there would be received then $186.00. Pro-rating this charge, the initial carrier would receive $52.08, that is 52 cents per ton for a distance of 28 miles or 12 cents more than the service cost. Following the court's process of deduction, the initial carrier, for this service, would lose the difference between the amount received, $52.08, and the amount which it would have received had the coal been delivered 28 miles distant from the initial point, $120.00, or $67.92. That is to say though in fact the carrier makes a profit of 12 cents per ton upon its haul of 28 miles under the trebled rates it would still, according to the basis upon which it has been assumed the court has made its finding, lose 67.9 cents per ton, or 15 cents per ton more than it would lose under the lower rate.

Plainly the court did not mean to announce a finding so patently erroneous. It might, consistently with the figures produced, demonstrate the ill effect of com-

pulsory pro-rating, either from the viewpoint of mathematics or of logic. This must have been the mind of the court. Such a view of its purpose is sustained by repeated reference in the opinion to the pro-rating feature of the statute. (Transcript, Vol. I, pp. 24, 25, 27, 34 and 35). It does not attribute the so-called loss in dollars and cents so much to the insufficiency of the statutory rates but to the final paragraph of the statute. The provision referred to is as follows:

> "In case any shipment of coal under the provisions of this section must pass over two or more lines of railroad to reach its destination, then an additional charge of two dollars and fifty cents per car for each transfer may be allowed and collected to cover cost of switching, and the total amount of freight and switching charges shall be divided among the several railroads concerned upon such basis as to them may seem just; provided, that if such railroads cannot agree among themselves upon an equitable division thereof, then the board of railroad dcommissioners shall decide the matter, subject to appeal to the courts."

This section has been somewhat condemned by the court below apparently because it has erroneously assumed that it compels the division of freight receipts between connecting carriers in proportion to mileage. There seems to be no language making such a division obligatory. The apportionment is left to the carriers themselves. In case they fail to agree it may be left to the board of railroad commissioners. No order

has ever been made compelling division upon any particular basis in the state of North Daktoa. Hence, if the freight receipts have been so divided it has been done voluntarily, and in case of voluntary submission to such an apportionment the Soo Railroad Company cannot now complain that it is unequitable and unjust.

Louisville & Nashville Ry. Co. v. Comm. 208, Fed. 41, 47.

However, discususion of this section is perhaps needless. Whatever may be the correct interpretation of its language, it remains that the emphasis of the court below is placed by frequent repetition and express statement upon the effect of the division of freight charges between connecting carriers rather than upon the insufficiency of the revenues received under the coal rates here involved. It is this phase of the statute which is considered particularly in connection with the finding of loss in dollars and cents, and the cost phase of the traffic is touched especially in the finding that out-of-pocket costs are returned with a fair contribution to other expenses.

9. *It is a Single Commodity Rate Only which is Involved.*

Were an entire schedule of rates in question the proof of the value of the property employed for the public convenience and of the cost of the service ordinarily would furnish the essential factors from which to pass upon the reasonableness of the rates. However, where the rate upon a single commodity is involved the cost of service is not readily ascertained. The principal witness for the Soo road admitted the

impossibility of arriving at the cost of carrying the commodity. (Transcript, Vol. I, p. 19). And in *Central Yellow Pine Association v. Ill. C. R. Co.*, 10 I. C. R. 537, the question is said to be one of almost insuperable difficulty. There is such a diversity of elements entering into the problem that an exact computation is well nigh impossible. The subject was discussed by the Interstate Commerce Commission in the case just cited. Its conclusion there is that the reasonableness of a commodity rate depends upon the value, volume and other characteristics affecting the transportation of the commodity. The following shows the reasoning of that body:

> "But it is further contended on behalf of the defendants that lumber, considering its character and all the conditions incident to the services rendered in its transportation, was not, at the 14-cent rate in force at the date of the advance, yielding its property proportion of the revenue reqquired by the defendants to meet their expenses—in other words, that the rate as applied to lumber was not a reasonable rate, viewed from the carrier's standpoint, in that it was not adequately remunerative. The question of the reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty.
>
> "In *Smyth v. Ames*, (Nebraska Freight Rate Case, 169 U. S. 466; 42 L. ed. 819, 18 Sup. Ct. Rep. 418), there was involved an entire system of rates applicable to all traffic on the roads in

the state of Nebraska and not the rate on a single commodity or article of traffic. In that case the Supreme Court held that the carrier is entitled to earn 'a fair return upon the value of that which it employs for the public convenience.'

"The value of the entire property of a road employed for the public convenience can shed but little if any light upon the question whether the rate on a single among thousands of articles of traffic yields its proper proportion of a fair return on that value. The rate on one article of traffic may be reasonably high and the carrier fail to earn a fair return on the value of the entire property employed for the public convenience because of unreasonably low rates on other traffic, and vice versa, the rate on one article of traffic may be unremunerative or unreasonably low and the return to the carrier from its entire business may be fair or reasonably high, the deficiency under the rate on the one article of traffic being made up by the rates on the balance of the traffic * * * It has not named any as shedding light upon the reasonableness of a rate on a single commodity like lumber. It is evident that such elements are widely variant in the two cases. Where an entire system of rates is involved, the principal, if not the only question, is, whether the revenue yielded by the rates on all traffic is a fair return on the value of that which is 'employed for the public convenience'—a question, the determination of which, as we have shown, can

have only a very remote, if any practical bearing on the reasonableness of a rate on a single article is in issue, the question (which could not arise in the former case) whether the rate is unjustly discriminatory or unduly preferential, may be presented, and the reasonableness of the rate depends upon the value, volume and other characteristics affecting the transportation of the particular commodity to which it is applied."

In an earlier case, *Thurber vs. N. Y. Co.*, 3 I. C. C. Reports 473, the same tribunal said:

"The cost of service, while recognized as an important element in classification and rates, is not alone controlling. On that basis some articles on account of relation of commercial value to cost of service, though furnishing a large volume of traffic, would not be carried at all, and others of high commercial value would have a very low rate without increasing tonnage.

"Another element of the highest importance, and that cannot be disregarded, is the value of the service to the article carried. This is a factor that largely determines the classification and rates the article will bear in the transactions of commerce, and necessarily qualifies the influence of other factors in the distribution of charges with the view to average reasonable revenue."

The very difficulty encountered in ascertaining accurately the cost to the carrier of the service rendered makes it desirable and necessary, in judging of the reasonableness of a rate, to take into con-

sideration all of the elements and factors which can possibly throw light upon the problem. To these we have already called attention. Many of them are discussed in *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 141 Fed. 1003, 1015. If the value of the service cannot be mathematically ascertained so that the line of demarcation between profit and loss is located with relative precision, the presumption in favor of the reasonableness of the rate must prevail. This should be emphatically so where the entire business is profitable, and where other elements favorable to the rate exist.

Summary: *In View of all Proper Considerations Confiscation has not been Established.*

Upon a railroad objecting to the prescribed rates falls the burden of proving that the constitutional guaranty of protection to its property is infringed thereby.

M. & St. P. Railway Company v. Tompkins, 176 U. S. 173; 44 L. ed. 420.

Arkansas Rate Cases, 187 Fed. 290.

Louisville & Nashville Railway Companies v. Commission, 208 Fed. 35.

The rule as to the finality with which confiscation must be established is clearly stated in *San Diego Land & Town Co. v. National City*, 174 U. S. 754; 43 L. ed. 1160 as follows:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably un-

reasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owners and to the public; that is, judicial interference should never occur unless the case presents, *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

Under all of the conditions prevailing and upon all considerations applicable, confiscation has not been established by the carriers. In each of these cases there is an adequate return from the intrastate business as a whole.

Upon the Northern Pacific Railroad there was, according to the basis used, a profit upon the lignite business of nearly $900.00. This was over and above *all* expenses assignable to the traffic, including fixed charges of all classes. To this extent the coal traffic compensated the carrier. So much was contributed by it to dividends. Whether it yielded the same percentage of return that was yielded by the business as a whole does not appear. There are no data from which the value of the property used in that business may be ascertained. This amount of profit was found without giving the coal business the benefit of the principle of classification in assigning cost. Had this been done as in justice should have been done it can-

not here be said how much would have been added to the carrier's profit.

In the case of the Soo Railroad 60 per cent of the revenue received from the coal business paid the actual expenses incurred by the traffic. The remainder contributed toward expenses which would have existed had there been no such business and which in the absence of such a business would have been borne by other freight. This conclusion was reached without giving the traffic the benefit of freight classification and after charging to it extra expense for branch line service and burdening it with the unfavorable conditions under which it was handled. Had average conditions been applied the result would undoubtedly have been as favorable as in the case of the Northern Pacific Company. In fact if the cost of service assigned had been proportioned to the low grade of freight constituting the traffic there would unquestionably have been shown a considerable percentage of profit.

It should be remembered also that the adverse result in this case was attributed to the pro-rating feature of the statute rather than to the insufficiency of the rates. Furthermore in weighing the reasonableness of these rates it must not be overlooked that the state through its legislature by enacting this statute declared a public policy favoring a local industry and intended to promote the general welfare of its people. That the rate affected only a negligible quantity of freight upon either of the carriers and that of the lowest grade.

Upon these considerations it is contended that con-

fiscation has not been established. In view of the adequacy of the returns from the intrastate business as a whole the rates have visited no positive loss upon the carriers. On the contrary in one case they have contributed to dividends. In the other they have, without considering any of the elements which would favor the traffic, lightened the burden which otherwise would have been laid upon other freight. It is these special facts and these considerations upon which the decision must be based.

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